PANG LIM v. CHINA INSURANCE CO. LTD.

[F.C. (Suffian L.P., Wan Suleiman F.J. & Chang Min Tat J.) August 27, 1975]
[Kuala Lumpur — Federal Court Civil Appeal No. 47 of 1975]

Road Traffic — Motor car insurance — Application for first class policy — Comprehensive policy issued — Deletion of clause relating to insured driving car not belonging to him — Regulations of Malaysian Insurance Association — Road Traffic Ordinance, 1958, s. 74(1).

Insurance — Policy — Deletion of indemnity clause — Application for a declaration that deletion was null and void.

In this case the appellant met with an accident while driving a friend's car and found that the terms of his own motor car policy did not cover the particular risk by reason of the deletion of the clause of the policy relating to indemnity while the insured was driving a motor car not belonging to him. He applied to the court for a declaration that the deletion of the clause was null and void and of no effect, for rectification of the policy and that the respondents be made liable to pay the damages arising from the accident. The learned trial judge dismissed the application and the appellant appealed.

Held, dismissing the appeal: the appellant in this case had obtained substantially the policy he asked for and therefore the declaration sought by the appellant could not be made.

Case referred to:-

(1) *Croisdale's Case* (1931) 40 Lloyds L.R. 22.

FEDERAL COURT.

Lim Kean Chye for the appellant.

Khoo Eng Chin for the respondent.

Chang Min Tat J.: The appellant met with an accident while driving a friend's car and found that the term of his own motor-insurance policy did not cover this particular risk by reason of the deletion of a clause of the policy. The clause was clause 2(b) of Section II.

Section II relates to liability to third parties and clause 2 reads:

"2. In terms of and subject to the limitations of and for the purpose of this section the company will indemnify

(a) ...

(b) the insured whilst personally driving a private motor car (but not a motor cycle) not belonging to him and not hired to him under a hire purchase agreement."

It is common to both parties that the deletion of sub-clause (b) meant that the insurers were not liable to pay the third party's claim for damages arising out of the appellant's driving of a car not belonging to him.

This however did not mean that the third party's claim was frustrated. It would be met by the car owner's insurers under the ordinary provision of authorised driver to include any other person driving on the policy holder's order or with his permission, which the appellant must inferentially be. It is therefore not a matter of speculation for whom the claim was brought.

This sub-clause was analogous to "the knock for knock" agreement relating to damages to cars. Any unilateral deletion of the sub-clause by one insurer would affect the position of other insurers. Such other insurers would therefore have a cause of complaint. This was recognised by the Malaysian Insurance Association (hereinafter referred to as the M.I.A.), which is an association of insurers under the guidance or supervision of a Director-General of Insurance, a Government appointee. Its circular No. 113 of 1972 issued on September 7, 1972, stated:

"2. It has been brought to the Committee's notice that certain companies are deleting this paragraph which has the effect of their avoiding liability if their insured meets an accident when driving a motor car not belonging to him.

3. The third party liability in respect of such an accident is then transferred to the company insuring the private car in question."

Be that as it may, this court, like any other court, is bound to give effect to the appellant's claim if it was founded on fact or in law.

The appellant claimed that he had asked for a "first-class policy" of motor-insurance and was given a cover-note which gave him cover "in the terms of the company's usual form of Comprehensive Policy applicable thereto." In the proposal form which he had signed, all the warning he had of any extraordinary deletion was one, under a rubber-stamp impression, excluding passenger liability in private car insurance. There was no notice of any refusal to provide for cover to him while driving another car. In the policy, however, the sub-clause relating to such cover was deleted. It was his contention that he had asked, if not expressly, at least impliedly, when he asked for a first-class policy, for this cover, as being in the usual form of the insurer's policy. He therefore asked for a declaration that the deletion was null and void and of no effect, a rectification of the policy and a further declaration that the defendants were liable to pay the damages, including costs, arising from the accident.

The defence denied that this particular cover was asked for and averred that the usual form of the policy did not cover this risk.

The evidence led for the plaintiff was brief. He had no English education and he had left the matter of motor insurance to the company which sold him the car. All he did was to sign the proposal form. In re-examination, he even said he did not know if he had to have insurance before he drove a car.

His evidence, it is to be noted, did not disclose what was the exact policy he had asked for, or that he relied on the usual form of policy.

His evidence was challenged, naturally, by the defence. In cross-examination, he averred that he was not given the policy of insurance. By inference, he would want the court to believe that he would not know about the deletion. He maintained that the policy to be issued to him was, in his own words in Chinese, a first-class policy and that it was explained to him that this meant he would also be covered whilst driving another person's vehicle.

The car seller who completed the proposal form for the appellant and who must be regarded as the appellant's agent however testified that the first-class policy, in the plaintiff's own words did not mean the cover which he now said he asked for. To him it meant a comprehensive policy. The appellant had bought a new car. The make was a fairly exclusive one and the price he had paid was substantial. What he required therefore in addition to the statutory requirement of insurance against third party claims was cover for damage to the vehicle. His personal interest was for his own car. Third party claims were, by the compulsory insurance under the Road Traffic Ordinance a matter of concern for the insurers and did not necessarily include cover for him whilst driving another person's car.

The car-vendor also testified that he did give the original policy to the appellant and proved that the appellant had previously taken out a comprehensive policy of motor insurance similarly with the sub-clause deleted.

Another defence witness adduced evidence of this deletion in the insurers' policies since 1968.

In the circumstances of this case, it must be a matter of grave doubt that this untutored motorist did have any requirement for the cover which was deleted.

On this evidence, the learned trial judge not surprisingly found as facts that what the appellant had asked for was a comprehensive policy of insurance, that he did not ask for or specify the inclusion of the sub-clause, that the policy with the sub-clause deleted was the "usual" policy issued by the respondents, and that this usual policy represented the actual bargain between the parties. He also considered that the payment of the full premium had no relevance in the determination of the issue.

In view of the facts found by the learned trial judge which could not, on the evidence be faulted, learned counsel for the appellant based his arguments on appeal almost entirely on the meaning of the usual form of the insurers' policy. He strongly urged that this meant the policy was undeleted. It is however only fair to note that his submission in the lower court included such as contention.

The first point that he took was that the insurers were not allowed prior to September 14, 1973 to make the deletion. This was postulated on the existence in this country of the M.I.A., the use by general agreement between the insurers of a common form of policy, and the view of the M.I.A. that such a deletion was a breach of the Tariff, a word used to designate the general agreement between the insurers as reached in the M.I.A.

The learned judge took the view that the regulations of the M.I.A. formed "a code of conduct" for the members, but a breach of any of the provisions of the code or tariff would entail no legal consequences.

With respect, I agree. It is in my view clear that whether a member had committed a breach was strictly a matter between the general body and the member concerned and could have no bearing on the question whether the act leading to the breach was lawful or within the powers of that member to do.

As to this there can be no doubt that the cover given in sub-clause 2(b) of Section II in the standard form of the policy which was mandatory for members to use was not a statutory requirement for compulsory third party insurance under the Road Traffic Ordinance 1958, so long as under the policy the cover is extended to an authorised driver other than the insured of the car covered by that policy. Section 74(1) of the Road Traffic Ordinance 1958 reads:

"74. (1) Subject to the provisions of this Part of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Ordinance."

As noted earlier on there was this extension of the cover to an authorised driver. The breach of the Tariff was therefore vis-a-vis the legislation not unlawful or outside the competency of the insurers, however it might expose the insurers to possible disciplinary action by the M.I.A. or to a lowering of the esteem they were hitherto held by their confreres.

The basic difficulty encountered by the appellant was that in a contract with his insurers, it was the insurers' usual form of policy that he asked for and was given not the common policy of the M.I.A. and that he could not dispute that the insurers' usual policy as used at the relevant time was with the sub-clause deleted.

It was also suggested that the deletion was not properly done, as not being effected by a printed slip, attached to the policy. This requirement was urged as being absolutely vital, by reason of Motor Circular No. 118 of 1968. This particular circular reads, in its relevant parts thus:

"It is mandatory for members to use the policy forms as given in the Tariff. Any alterations to the standard forms should be made *by endorsement.*

Note: An endorsement is a special condition appended or affixed to a policy to provide for *some alteration* in the text of the policy. It is either *written or typed* on the back of the policy, or a printed slip is attached thereto.

The Insurance Commissioner has however agreed that endorsements placed on a policy form by means of a rubber stamp are acceptable, providing such are clearly legible. The alteration must be apparent and prominently displayed."

It was contended by learned counsel for the appellant that on a proper and reasonable interpretation of this circular, the deletion of the sub-clause by means of lines drawn across the relevant words was not in accordance therewith and therefore failed to take effect. With respect, I cannot agree. Such deletion must come within the "written" provision in the circular, but in any event, further to and apart from the deletions, there were typed on the policy the words "Sub-section 2(b) of Section II of this policy is deemed to be cancelled." It is in my view clear that this typed alteration must have the effect meant by the insurers.

On the facts of the case as found by the learned judge, this was not a case where the insured got a policy he did not bargain for. *Croisdale's* case[1] which was cited was a case of this nature and, with respect, did not in my view apply. It followed from the conclusion of the learned judge that the appellant obtained substantially the policy he asked for, a fact which could not be controverted on the evidence and which this court must therefore accept, this declaration sought by the appellant could not be made. Nor could his alternative prayer for rectification be entertained. There was no question of fraud or of mutual mistake within the provisions of section 30 of the Specific Relief Act, 1950.

I would therefore dismiss the appeal with costs.

Suffian L.P. and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Jayadeva & Zahir; Khoo & Sidhu.*